Supreme Court, U.S.
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No.

In The

Supreme Court of The United States

JACK FERRANTI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioner was convicted of arson in which a firefighter died, in violation of 18 U.S.C. § 844(i). Where a death results, 18 U.S.C. § 844(i) provides for a punishment of "any term of years" with a maximum of life imprisonment or death. Selection of an appropriate sentence within this broadest of ranges -- "any term of years" -- is controlled by the Sentencing Guidelines. Pursuant to § 2K1.4(c)(1) of the Guidelines, if "death resulted" from an arson, the court is directed to "apply the most analogous guideline from Chapter Two, Part A (Offenses Against The Person) if the resulting offense level is greater than" that determined under the arson-Guideline sections 2K1.4(a) or (b).

Three guidelines from Chapter Two, Part A provided higher offense levels than the offense level determined under section 2K1.4: First Degree Murder (level 43); Second Degree Murder (level 33) and Voluntary Manslaughter (level 25). The corresponding sentencing ranges for these offense levels (where there is no criminal history) are 57-71 months, 135-168 months, and "life". The sentencing judge here selected First Degree Murder as the "most analogous" guideline, and sentenced the defendant to 435 months after determining that that term was the actuarial equivalent of a life sentence; the judge added back the "good time" months that the Petitioner could be "expected" to gain, so that the sentence would equal a life sentence (less a month).

The first question presented is:

1. Whether a sentencing scheme that, in effect, creates three levels of "arson / homicide", each carrying a distinct level of punishment, and that allows the court to determine the applicable level by finding facts concerning the defendant's "intent" under a preponderance of the evidence standard, violates the Constitution, and whether the Second Circuit's decision that it does not, is an incorrect reading of this Court's recent decision in Jones and the principle of Apprendi .

Evidence discovered by petitioner after trial demonstrated not only that material aspects of the testimony (the only corroboratable aspects) of an important Government witness were false, but also that the Government knew or plainly should have known that the testimony was false. The Government acknowledged that it had failed to follow up the witness's statements prior to trial, but proffered that the falsity was the product of an "unintentional mistake" by the witness.

The second question presented has two parts:

2. First, what is the standard for granting a new trial where it is discovered after trial that the Government proffered testimony that it knew or should have known was false; and, second, does the applicable standard depend on a finding regarding the intent of the witness (which was never determined except by the government's "say-so"), or is it concerned exclusively with the knowledge (or constructive knowledge) of the Government?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Prosecutor, United States of America, and Defendants-Appellants Mario Ferranti and Thomas Tocco, as well as Petitioner Jack Ferranti.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 2001

No.

JACK FERRANTI,

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UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The Court of Appeals' summary decision affirming the denial of petitioner's claims made pursuant to 28 U.S.C. § 2255 is reprinted in App. A.1-6. The District Court's Order Denying 2255 relief is reprinted at A.7.

The Second Circuit's Order Affirming The Conviction On Direct Appeal is reprinted at A.8.

JURISDICTION

The decision was entered on March 20, 2001. Jurisdiction is invoked under 28 USC §§1254(1) and 2101(c).

PERTINENT STATUTORY PROVISIONS

The pertinent portion of the arson statute, 18 U.S.C. § 844(i), is reprinted at A.34; the arson Guideline, §2K1.4, is reprinted at A.38: the first- and second-degree murder Guidelines, §§2A1.1 - 2A1.2, are reprinted at A.35 and A.37.

STATEMENT OF THE CASE

Following a jury trial, petitioner was convicted of arson under 18 USC §844(i), arson conspiracy (§371), mail fraud (§1341), and witness tampering (§1512). He was sentenced to 435 months in prison. The Second Circuit affirmed the conviction upon direct appeal (United States v. Tocco, 135 F.3d 116 (2d Cir. 1998)), and this Court denied certiorari, 153 U.S. 1096 (1998). Following the discovery of new evidence, and the decision of this Court in Jones v. United States, 526 U.S. 227 (1999), petitioner moved for a new trial and attacked his sentence as unconstitutional pursuant to 28 U.S.C. §2255. His petition was denied by the District Court on May 30, 2000 (A.7). The Second Circuit affirmed on March 20, 2001 (A.1).

1. The Evidence: On a February night in 1992, firefighters were called to a three-story walk-up building in Queens, New York, the upper floors of which were rented to residential tenants and the ground floor of which was leased to petitioner for his use as a clothing store. Two firemen proceeded to the second floor. Tragically, one of them fell to his death from the second story window. All the residential tenants escaped.

There were, in essence, three parts to the Government's case that petitioner was responsible for the fire: evidence of

motive (to obtain an insurance award for an ailing business); evidence of consciousness of guilt (in the form of false statements and coercion of witnesses); and, critically, evidence of a connection between petitioner and co-defendant Thomas Tocco, who was identified at the fire scene and who, purportedly, confessed to setting the fire "for petitioner."

The link between petitioner and Tocco was based on the testimony of Vincent Marziano. Marziano, a convicted felon, drug abuser, and friend of Tocco and Mario Ferranti (petitioner's brother), testified that at 2 a.m. on the night of the fire, Tocco came to his Bronx home and told him that he and Mario had just set a Queens building on fire "for Jack".

On its face, the evidence of Tocco's confession to Marziano was obviously devastating. At trial, the defense fought to preclude the evidence. This effort failed when the court determined, in light of the surrounding circumstances attested to by Marziano, that Tocco's statement was admissible as an excited utterance. The defense then endeavored to impeach Marziano's credibility to demonstrate that the confession attributed to Tocco by Marziano had never been made.

2. The Government's Failure To Disclose That Marziano Testified Falsely In The Grand Jury: A critical part of Marziano's story was that Tocco – supposedly all excited from just having set the fire -- had come to Marziano's apartment in the early morning hours just after the fire and, to get Marziano's attention, "banged" on Marziano's window. When Marziano testified in the grand jury, he claimed that at the time, he had lived on Robertson Avenue with his girlfriend Fran.

This part of Marziano's story was the only circumstance susceptible to verification. Only after the 2255

petition was filed, *proving* that Marziano's statement was not true, did we learn that Government investigators had discovered it was not true prior to trial. However, inexplicably, the Government had not disclosed to the defense the evidence it acquired proving that Marziano had testified falsely in the grand jury. Nor did it reveal that, when confronted by the government at the time, Marziano immediately changed his story.

Thus, as revealed post-trial, only after Marziano testified in the grand jury, Government investigators located Marziano's estranged girlfriend Frances Cali and questioned her about the time period of the arson. Ms. Cali informed investigators that she did not live with Marziano at the Robertson address in February 1992; in fact, she had not lived with Marziano since 1989. Armed with this information, the investigators confronted Marziano, who then changed his story. He told them that he "believed" he was living in an apartment on Calhoun Avenue.

Since the "banging on the window" was such a crucial part of the story of Tocco's excited confession, Marziano needed to assure the investigators that the particular location of his residence had no significance. He thus "noted that the two apartments had similar set-ups, and that Tocco could have knocked on his window at either place." He also advised that "he had moved frequently throughout those years," "had difficulty remembering when he resided at particular locations," and had no documents that would confirm where he had lived. The government claimed in response to the 2255 petition that its attempts to verify his latest story were unsuccessful.

At trial, the Government did not advise the defense that Marziano had given false testimony in the grand jury, or that he

had changed his story when confronted with contrary evidence uncovered before trial, or that his new version could not be verified. Indeed, it was only on cross-examination of Marziano that the defense heard for the first time the claim by Marziano that his grand jury testimony was not "accurate", and that he had (supposedly) lived on Calhoun when Tocco supposedly banged on his window to confess.

3. Marziano's Cross-Examination: When Marziano was cross-examined as to his various living arrangements, he claimed that he had left the house on Robertson after his son was born in 1989, and that he was living in a two-family house on Calhoun Avenue with John Tancredi when Tocco came to his window. He claimed that the set-up of the house on Calhoun was "the same" as the house he had lived in on Robertson with Fran, "with the window and everything", and that his friends used to bang on the upstairs window of the house he lived in with John, just like they were able to bang on the window of the house he lived in with Fran. Marziano said he had lived with Tancredi on Calhoun about two or three years, and "believed" that, after that, he moved first to his father's house on Revere and then lived on Arthur Avenue with Joseph Aprea for part of 1992 or 1993.

4. The Newly Discovered Evidence: After trial, defendant was able to gather evidence demonstrating that Marziano's trial testimony about living with Tancredi on Calhoun was also false. Defendant presented a sworn statement made by Tancredi, stating that he had never been contacted by the government to verify anything about Marziano, and that he was not living with Marziano in 1992. Rather, Marziano lived with Tancredi for a short time from the summer of 1989 until February 1990. Also according to

Tancredi, Marziano's testimony that they lived on the second floor and that people used to regularly knock on the second-floor window was not true. The apartment he shared with Marziano (which was actually on Quincy Avenue, the next street over from Calhoun, though it was referred to as Calhoun) was in the basement, not on the second floor. There was thus no similar "set-up", with an upstairs "window" that someone could "bang on". (Tancredi also swore that Marziano's testimony that, after he moved from Calhoun, he lived with his father in Revere could not have been the truth; Marziano told him that his father had sold the house in Revere long before then. Tancredi concluded with the observation that he knows Marziano to be a habitual liar.)[1]

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. It was, of course, not up to defendant to prove where Marziano was living in February, 1992; what was relevant was that, contrary to his trial testimony, Marziano was *not* living in on (or near) Calhoun with Tancredi, in an apartment with a set-up similar to the apartment he had lived in on Robertson, where people regularly knocked on the window to gain entrance to the apartment. However, defendant did proffer additional evidence that Marziano either was living above a funeral parlor on Arthur Avenue (where a knocking on the window by someone outside was not possible) or was in a drug rehab program in California at the time. Defendant also proffered evidence that Marziano gave other false testimony at trial in addition to the false testimony about where he resided when Tocco supposedly "banged" on his window in a state of excitement and then confessed. The new evidence concerned, in part, admittedly collateral matters (what Marziano did with funds he was paid

5. The Government's Response: Based on the defendant's newly discovered evidence and its own post-2255-petition investigation, the Government acknowledged that "in all likelihood Marziano testified incorrectly about his residence at the time of the fire." (The Government proffered that, prior to trial, it had attempted to "verify Marziano's residence on Calhoun around the time of the arson but [was] unable to do so." Inexplicably, its attempt to verify Marziano's account did not include an attempt to locate Tancredi.)

The Government suggested, however, that its failure to investigate should not matter, because Marziano was simply "mistaken" about where he resided at the time, and that this "innocent" mistake was understandable in light of his "years of drug abuse and relative transience" -- matters that, it claimed, were extensively explored by defense counsel on cross.

6. The 435 Month Sentence: Two statutory provisions in effect at the time of the offense are relevant to a discussion of Mr. Ferranti's sentence: the arson statute, 18 U.S.C. § 844(i), which provides three different sentences depending on the surrounding facts (a sentencing range of 5-20 years if no one is injured, an enhanced sentencing range of 7-40 years if "personal injury results to any person", and "any term of years, or to the death penalty or to life imprisonment" "if death results to any person"); and 18 U.S.C. § 34, which, at the time of the offenses, authorized the imposition of a life sentence only by recommendation of the jury. (18 U.S.C. § 34 has since been amended and no longer requires a jury recommendation.)

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by the Government, and where Marziano supposedly lived after the fire.) However, the cumulative impact of the new evidence was to demonstrate Marziano's thorough unreliability.

Also relevant is the scheme for sentencing arson offenses under the Sentencing Guidelines. In cases where "arson results in death", the Guidelines, like the arson statute itself, provides for three different penalty structures. In order to determine the appropriate penalty, the court must make certain findings of fact about the arson in addition to the fact found by the jury that death resulted. Thus, pursuant to U.S.S.G. § 2K1.4(c)(1) of the Guidelines, if death resulted from an arson, the sentencing court is directed to "apply the most analogous guideline from Chapter Two, Part A (Offenses Against The Person) if the resulting offense level is greater than" that determined under U.S.S.G. § 2K1.4(a) or (b).

In this case, three guidelines from Chapter Two, Part A provided higher offense levels than the offense level determined under § 2K1.4: First Degree Murder (level 43); Second Degree Murder (level 33) and Voluntary Manslaughter (level 25). The corresponding sentencing ranges for these offense levels (where there is no criminal history) are 57-71 months, 135-168 months, and "life". Based on his assessment of the facts, the sentencing judge determined that the first-degree murder guideline (U.S.S.G. § 2A1.1) was the "most analogous." Use of §2A1.1 yielded a base offense level of 43; the sentence dictated for this level is life imprisonment.

Because the plain language of 18 U.S.C. § 34 authorized a life sentence only by jury recommendation, and because a recommendation was never requested of the jury in this case, the judge could not lawfully impose a life sentence. So, instead, the judge calculated a <u>virtual</u> life sentence: 435 months in prison. (This number was derived by first determining petitioner's life expectancy from the time of sentencing, subtracting one month, and adding back the good-time credit to which petitioner would potentially be entitled.)

On direct appeal, petitioner argued, inter alia, that the Guidelines were ambiguous and had been misapplied, and that imposition of a 435 month sentence, which was tantamount to a life sentence, violated due process and 18 U.S.C. § 34's requirement of a jury recommendation before a life sentence could be imposed. The Circuit Court rejected these arguments, and certiorari to this Court was denied.

7. The §2255 Petition: After the conviction was affirmed, this Court issued its decision in Jones v. United States, 526 U.S. 227 (1999). Based on Jones, petitioner moved for collateral relief, arguing that the Guidelines, which provide for vastly increased incarceration depending on unguided fact-finding by the trial judge regarding the homicide, "conflict with the safeguards enshrined in the Constitution for the protection of the accused", and as such, they must be deemed unconstitutional.

The Government countered that the constitutional claim was procedurally barred because it was not raised on direct appeal, and no cause for the failure to raise it was shown. (In reply, counsel for Mr. Ferranti urged, first, that the essence of the claims raised on direct appeal -- that only the jury could impose a life sentence, that the sentencing court did an end-run around the jury, and that the ambiguity of the Guidelines allowing courts to select the "most analogous" homicide guideline led to unacceptable arbitrariness- was at the heart of the constitutional concerns informing this Court's decision in Jones; and, secondly, that if the failure to raise the constitutional issue on direct appeal constitutes a procedural default because the issue was "available" to counsel at the time of the direct appeal, then the failure to raise it constitutes ineffective assistance of counsel.) On the merits, the Government argued that Jones was inapplicable because,

unlike Jones, the fact that increased the maximum sentence to "any term of years, or to the death penalty or to life imprisonment" – i.e., that "death results to any person" – was charged in the indictment and found by the jury beyond a reasonable doubt; any other factors relevant to sentencing under the Guidelines, it argued, did not increase the statutory maximum sentence of death or life imprisonment and, accordingly, were not subject to the constitutional strictures suggested by Jones.

8. The Lower Courts' Holdings: Both the district court and the Second Circuit reached the merits (rejecting the government's waiver claim). Without elaboration, the district court merely concluded that it had "considered all of your points and they are well made, but they don't persuade me... I don't find any 2255 violation here." (Transcript of Sentence, Reprinted in Second Circuit Appendix).

The Second Circuit rejected the petitioner's claims in an unpublished summary order (A. 1). On the issue of whether the government's knowing introduction of false testimony (or purposeful avoidance of knowledge that its witness was testifying falsely), warranted a new trial, it ruled that (1) the failure to disclose Marziano's "mistaken" testimony before the grand jury was not a Brady violation [Brady v. Maryland, 373 U.S. 83 (1963)] because "a number of witnesses (in addition to Marziano) gave testimony devastating to Ferranti"; and (2) that Marziano's testimony was insufficiently crucial to Ferranti's conviction for the Court to have to decide whether the government had an obligation to do more than it did in connection with investigating his credibility.

On the sentencing issue, the Court ruled that the sentence was "entirely constitutional" under Apprendi v. New

Jersey, 530 U.S. 466 (2000).[2] The Court agreed with the Government that Apprendi was not implicated because the sentence was not in excess of the statutory maximum. To the extent that the constitutionality of the Guidelines was being challenged, it ruled that Apprendi does not preclude a sentencing court, when applying the Sentencing Guidelines, from considering facts not considered by the jury.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Opinion Is In Conflict With This Court's Holdings In *In re Winship, Mullaney v. Wilbur, Jones v. United States,* and *Apprendi v. New Jersey*

In re Winship, 397 U.S. 358, 364 (1970), established the principle that the constitutional guarantee of due process protects a criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Generally, the determination by the legislature of the elements of the offense is conclusive in assessing what facts the prosecution must prove in order to convict. See McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986). A corollary of this is that factors that bear only upon the sentence to be imposed, and are not elements of the offense, typically need not be proven beyond a reasonable doubt by the prosecution and may be determined by the sentencing court based on a preponderance of the evidence.

However, this Court has also recognized that the due

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2 Apprendi was decided after the filing of the 2255 petition in the District Court but before the appeal to the Second Circuit.

process guarantees of the Constitution impose some constraints upon how far these general propositions may be taken. Thus, in Mullaney v. Wilbur, 421 U.S. 684, 704 (1975), the Court held unconstitutional a provision governing the sentence imposed for felonious homicide. Under Maine law, "absent justification or excuse, all intentional or criminally reckless killings [were] felonious homicides," which were punishable by life imprisonment. Id. at 691. However, if a defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation, he would be sentenced to a minimum of a nominal fine and a maximum of 20 years imprisonment. See id. at 691-92. Although Maine defined the crime of felonious homicide without reference to the presence or absence of heat of passion on sudden provocation, and treated the existence of this factor as one mitigating sentencing, this Court held "that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the issue is properly presented in a homicide case." Id. at 704.

This Court explained that in some instances due process requires the prosecution to shoulder the burden of proving facts bearing on the degree of criminal culpability beyond those facts necessary for conviction. This Court stated that determining when this was so requires "an analysis that looks to the operation and effect of the law as applied and enforced by the government and to the interests of both the [government] and the defendant as affected by the allocation of the burden of proof". Id. at 699 (citation & internal quotation marks omitted).

This emphasis on substance over form was reiterated in the two cases decided by this Court after petitioner's direct appeal, Jones, supra, 526 U.S. 227 (1999), and Apprendi, supra, 530 U.S. 466 (2000). In both cases, the Court

recognized that the Sixth Amendment right to jury trial and the due process clause of the Fifth and Fourteenth Amendments impose limits on a legislature's authority to define crimes and prescribe penalties. If the legislature has effectively established different degrees of culpability, with each subject to different degree of penalty, then the prosecution must establish beyond a reasonable doubt any facts upon which the distinctions turn.

Both Jones and Apprendi echoed Mullaney's concern that a legislature not manipulate its way out of the protections recognized in Winship -- either by redefining the elements that constitute different crimes and characterizing them as factors that bear solely on the extent of punishment, or by providing for extravagant maximum sentences and then leaving to sentencing judges the discretion to select a sentence within the large range. The courts are responsible for preventing this kind of manipulation and insuring the Constitutional protections.

The Jones Court specifically cautioned, moreover, that the Constitutional principles animating its holding applied broadly to all kinds of sentencing schemes. They apply to limit the power of legislatures in passing statutes (as in Jones) that fix penalties for discrete offenses, and they also apply to comprehensive Guideline sentencing schemes. The Court thus rejected the arguments of the dissent that its holding "will unsettle the efforts of many States to bring greater consistency to their sentencing practices through provisions for determinate sentences and statutorily or administratively established guidelines governing sentencing decisions." As the Court explained, it "disagree[d]" with the dissent's " prediction about the effect of our decision on the States' ability to choose certain sentencing policies"; in any event, "if such policies conflict with safeguards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional

guarantees." 119 S.Ct. at n.11.

Similarly, in holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," 120 S.Ct. at 2362-3, the Apprendi Court was not, we think, ruling out the possibility that statutory schemes not before it (in which, for example, judicial fact-finding did *not* increase the penalty "beyond the prescribed statutory maximum") might nevertheless run afoul of the Constitution. This was made clear by the Apprendi majority's response to the dissent's criticism that the "increase in the maximum penalty" rule "rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate".

The dissent viewed the holding a "meaningless formalism" because a legislature could so easily manipulate the rule by providing for extravagant maximum sentences and then leave to sentencing judges the discretion to select a sentence within the large range. The majority not only noted the political checks and restraints on a legislature that would inhibit it from setting maximum penalties that were disproportional to the offense, but also ruled that, if a legislature enacted such a scheme, "we would be required to question whether the revision was constitutional under this Court's prior decisions." 120 S.Ct. at 2362, n.16.

The arson Guideline cross-reference sentencing scheme involved here is just the kind of scheme envisioned by the dissent in Apprendi and thus demands review under the constitutional principles guiding the Jones and Apprendi Courts. When substance is considered over form, the conclusion is inescapable that Congress has exceeded the limit that the constitution places on its ability to define crimes and

set penalties. While this Court has not established a "bright line", it should grant *certiorari* to make it clear that the line has been crossed here.

Congress has provided for the widest possible sentencing range ("any term of years") in 18 U.S.C. § 844(i) when "death results" from an arson. However, the statute cannot be read in a vacuum and in isolation from the Sentencing Guidelines. Through its approval of the particular Sentencing Guidelines applicable to arson/homicides, Congress has also created three vastly different penalty ranges within this unlimited range for arson homicides, and it has left it exclusively to the sentencing court to both identify and find the facts that determine the particular, and wildly disparate, range that "applies" – and indeed, as discussed in our Second Circuit briefs, has yielded wildly disparate results, including far more lenient sentences in far more egregious cases, where, for instance, there were multiple deaths, or intended deaths.

Depending on the findings of the district court, the defendant may be subject to a sentence of as little as 57-71 months (when it determines that the homicide is "most analogous" to voluntary manslaughter) to as much as life (when it determines that the homicide is "most analogous" to First Degree Murder). Moreover, the facts that must be assessed in selecting both the guideline level under§ 2K1.4 and (presumably) the "most analogous" homicide guideline under Chapter Two, Part A (matters concerning state of mind, intent, and degree of risk) are of a kind traditionally left to a jury to decide, concerning, as they do, different grades of both the arson and the homicide offense. See, New York Penal L aw §§ 125.00, 125.10, 125.15, 125.25, 150.00, 150.05, 150.10, 150.15, 150.20. See also, Apprendi, 120 S.Ct. at 2364 ("the defendant's intent in committing a crime is perhaps as close as

one might hope to come to a core criminal offense `element.'")

In other words, under the arson Guidelines, the homicide aspect is actually treated as the gravaman of the offense, and the applicable sentence depends on a determination of the degree of homicide. Congress has thus effectively established different degrees of culpability, with each subject to different degrees of penalty, but has left it to the court, and not the jury, to find facts that increase the prescribed range of penalties to which the criminal defendant is exposed.

Jones reiterates that it is up to the jury to determine such matters as whether conduct amounts to first-degree or second-degree murder or whether it is more akin to manslaughter -- an issue decided solely by the sentencing court in this case. A sentencing scheme that takes this function away from the jury is unconstitutional. By removing from the jury any control over the facts that determine the applicable range, the jury's significance has been so diminished as to violate the Sixth Amendment and due process.

The Second Circuit's conclusion that the sentencing scheme did not run afoul of the holding or reasoning of Apprendi and Jones because the resulting sentence was below the "statutory" maximum - i.e., life imprisonment - is based on an improperly narrow view of both this Court's precedents and as well as the functions that Congress has entrusted to the Sentencing Commission. As Judge Nickerson in the Eastern District of New York recently noted in United States v. Norris, 128 F.Supp.2d 739, 742-43 (E.D.N.Y. 2001), the Commission's function is to "promulgate provisions, that is laws that, unless they are unconstitutional, the federal courts are bound to follow on pain of being reversed. 18 U.S.C. § 3742. In the felicitous words of Justice Scalia in his dissent in Mistretta v. United States, 488 U.S. 361, 427 (1989), the

Sentencing Reform Act of 1984 created "a new Branch altogether, a sort of junior varsity Congress", not controlled or supervised by any government branch or anyone else except by new legislation passed by Congress."

The Guidelines have the force and effect of laws prescribing the sentences criminal defendants are to receive. In this case, the Guidelines prescribe three degrees of culpability for arson homicide. Jones and Apprendi make clear that it is unconstitutional to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

While a clear line has not yet been drawn, the process employed in this case --one in which the critical fact-finding that pegs the penalty limit was delegated to the judge under a preponderance standard -- erodes the jury's function "to a point against which a line must necessarily be drawn." Jones, supra.

Since the Court's decisions in Jones and Apprendi were announced, there has been considerable confusion as the applicability of their principles to the Sentencing Guidelines. *Certiorari* should be granted in this case not only because the Second Circuit's decision is in conflict with this Court's precedents but also because it would provide this Court with a valuable vehicle for clarification of these precedents.

II. The Court Should Grant The Writ To Resolve A Question Of National Importance: The Standard For Granting A New Trial When The Government Adduces Testimony That It Knows Or Should Have Known Was False

While this Court has given considerable attention to the appropriate new trial standard in cases involving attorney

ineffectiveness, Strickland v. Washington, 466 U.S. 668 (1984), and prosecutorial misconduct and the non-disclosure of evidence, *e.g.*, Kyles v. Whitley, 514 U.S. 419 (1995), it has not answered the question of what the appropriate new trial standard should be in cases involving false testimony by a government witness. The Circuits employ a variety of standards. And different standards apply within a Circuit depending on whether the prosecutor was (or should have been) aware of the false testimony at the time of trial.

Where the perjury is not known to the prosecutor, several Circuits use the traditional "Larrison" test, derived from Larrison v. United States, 24 F.2d 82 (7th Cir. 1928) (new trial appropriate where (1) the court is "reasonably well satisfied" that the testimony given by a material witness is false, (2) without it the jury might have reached a different conclusion, and (3) the party seeking the new trial was taken by surprise when false testimony was given and was unable to meet it or did not know of its falsity until after the trial). See, United States v. Jarrett, 705 F.2d 198 (7th Cir. 1983); United States v. Wallace, 528 F.2d 863 (4th Cir. 1976).

The Second Circuit rejected the Larrison standard in United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), and replaced it with a "stricter" standard of materiality (from the defendant's point of view.) Instead of the "might have reached a different result" standard, the Second Circuit employs a "probability" standard: "probably would have produced a different result." *See also*, United States v. Krasny, 607 F.2d 840, 843-46 (9th Cir. 1979) ("probability standard" adopted for government's unknowing use of perjured testimony), *cert. denied*, 445 U.S. 942 (1980). After Stofsky, the Second Circuit tinkered with the "probability" standard and made it even stricter. *See*, Sanders

v. Sullivan, 863 F.2d 218, 226 (2d Cir. 1988) ("the perjured testimony ... must leave the court with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Accord*, United States v. Wallach, 935 F.2d 445 (2d Cir. 1991); United States v. White, 972 F.2d 16 (2d Cir. 1992); United States v. Sasso, 59 F.3d 341 (2d Cir. 1995); United States v. Damblu, 134 F.3d 490 (2d Cir. 1998).

The Second Circuit articulated a different standard, however, where the Government either knows or should have known that its witness's testimony was false. United States v. Wallach, supra, 935 F.2d 445, 456 (2d Cir. 1991): "Where the prosecution knew or should have known of the perjury, the conviction must be set aside "`if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Perkins v. LeFevre, 691 F.2d 616, 619 (2d Cir. 1982) (quoting United States v. Agurs, 427 U.S. 97, 103 (1976); see also Sanders v. Sullivan, 863 F.2d 218, 225 (2d Cir. 1988) (question is whether the jury's verdict "might" be altered); Annunziato v. Manson, 566 F.2d 410, 414 (2d Cir. 1977).

Indeed (the Second Circuit previously held), if it is established that the government knowing permitted the introduction of false testimony reversal is "virtually automatic." United States v. Stofksy, 527 F.2d 237, 243 (2d Cir. 1975) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)), cert. denied, 429 U.S. 819 (1976)." (Emphasis added.) Yet, it virtually skirted the issue here, because it stated – in accordance with the government's *ipse dixit* argument (that should have been left to a jury) – that Marziano had just been "mistaken". That, of course, is exactly what the jury should have determined, and why reversal should have been "automatic" in

this case.

Other Courts have expressed uncertainty as to the appropriate standard. *See, e.g.,* United States v. Nixon, 881 F.2d 1305, 1311-12 (5th Cir. 1989); United States v. Strauss, 443 F.2d 986 (1st Cir.), *cert. denied,* 404 U.S. 851 (1971); In re United States, 565 F.2d 173 (1st Cir. 1977) (uncertainty as to whether the "probability" or "might have" standard applied but need not resolve because evidence in the case before it failed under either standard).

And others confess that, notwithstanding different articulations in the standards depending on whether or not the prosecutor was (or should have been) aware of the perjury, it is difficult to find meaningful distinctions between the varying articulations. *See, e.g.,* United States v. White, 972 F.2d 16 (2d Cir. 1992) ("Although the *Wallach* opinion [*United States v. Wallach,* 935 F.2d 445 (2d Cir. 1991)] cites several cases with these varying articulations of the standard for review [depending on whether or not the government was aware of the perjury], it is difficult to determine if there is a meaningful difference, or simply a difference in articulation of the impact that the perjured testimony must have in order to meet the Rule 33 test of `required in the interest of justice'")

The Government acknowledged in the District Court that "in all likelihood Marziano testified incorrectly [our emphasis added] about his residence at the time of the fire." Since there is certainly a reasonable likelihood that Marziano's false testimony could have affected the judgment of the jury, under the principles articulated by the Second Circuit in Wallach, a new trial should have been ordered. Indeed, reversal ought to have been "virtually automatic."

However, the Second Circuit skirted application of its own standard when it decided that Marziano's testimony was "insufficiently crucial to Ferranti's conviction for this Court to have to decide whether the government had an obligation to do more than it did" in connection with "researching issues bearing upon his credibility" -- i.e investigating, and then not letting him testify falsely. .

We suggest that the Court of Appeals would have (and should have) viewed the matter in a different light if it had been held to a proper, unified, standard. The government should have to grant a new trial when, as here, it purposefully hides its eyes to a crucial witness's testimony, proffering it as true when it is false.

Motions for new trials based on newly discovered evidence of perjury by a government witness are common. See 59 A.L.R. Fed. 657 ("What Standard, Regarding Necessity For Change of Trial Result, Applies in Granting New Trial Pursuant To Rule 33 Of Federal Rules Of Criminal Procedure For Newly Discovered Evidence Of False Testimony By Prosecution Witness"), for a compilation of reported cases. But the rules of application are far from uniform; they do not decide what Due Process requires in the case of knowing use of perjured testimony.

A grant of *certiorari* in this case will allow this Court to resolve the conflicts among the Circuits and establish a uniform standard for ruling on such motions.

CONCLUSION

For each of the reasons set forth above, this Court should grant a writ of certiorari to the Court of Appeals for the Second Circuit.

June 2001

Respectfully submitted,

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SUMMARY ORDER - MARCH 20, 2001

JACK FERRANTI, Petitioner-Appellant, -v.- UNITED STATES OF AMERICA, Respondent-Appellee.
00-2271

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2001 U.S. App. LEXIS 4242

March 20, 2001, Decided

NOTICE:

[*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of New York (Weinstein, J.).

COUNSEL: APPEARING FOR APPELLANT: VIVIAN SHEVITZ, South Salem, NY (Jane Simkin Smith, on the brief).

APPEARING FOR APPELLEE: LAUREN J. RESNICK, Assistant United States Attorney, Brooklyn, NY (Loretta E. Lynch, United States Attorney for the Eastern District of New York, Emily Berger, Assistant United States Attorney, on the brief).

JUDGES: PRESENT: HON. DENNIS JACOBS, HON. GUIDO CALABRESI, Circuit Judges, HON. JANET BOND ARTERTON, District Judge. *

* The Honorable Janet Bond Arterton for the United States District Court for the District of Connecticut, sitting by designation.
OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment be AFFIRMED.

Petitioner-appellant Jack Ferranti appeals the judgment entered in the United States District Court for the Eastern District of New York (Weinstein, J.) denying his petition brought[*2] pursuant to 28 U.S.C. § 2255. Ferranti was convicted at a jury trial in the Eastern District of New York of arson homicide in violation of 18 U.S.C. § 844(i), arson conspiracy in violation of 18 U.S.C. § 371, related mail fraud counts resulting from insurance fraud in violation of 18 U.S.C. § 1341 and witness tampering in violation of 18 U.S.C. § 1512(b).

Ferranti raises the following three issues pursuant to a Certificate of Appealability: (1) was the testimony of government witness Vincent Marziano materially false at trial such that Ferranti deserves a new trial; (2) under the Supreme Court's decisions in Jones v. United States and Apprendi v. New Jersey, was it error for the district judge to determine the degree of homicide under Section 2A of the Sentencing Guidelines; and (3) did a material Brady violation occur as a result of the prosecutor's failure to turn over to the defense evidence in the hands of the Fire Department (specifically, that the helmet worn by the firefighter who died in the fire from a fall was condemned by OSHA).

1. Marziano[*3] testified at trial to a statement made to him by one of the arsonists, who (according to Marziano's account) knocked on his window at 2 a.m., woke Marziano, and blurted a statement that was admitted as an excited utterance. Marziano told the grand jury that he lived at one location at the time of the fire, but testified at trial that he was living at another location with one John Tancredi. The defense recently discovered from Tancredi that he was not living with Marziano at the relevant time. Ferranti deems this inconsistency critical because it raises the prospect that Marziano was living at yet another location at which there was no window to knock upon--which would discredit the only detail of Marziano's account capable of corroboration.

To the extent that Ferranti argues that the government's failure to disclose Marziano's mistaken testimony before the grand jury requires § 2255 relief, this nondisclosure was not material to Ferranti's conviction, as required by Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) (holding that a nondisclosure by the prosecution "violates due process where the evidence is material either to guilt or to[*4] punishment, irrespective of the good faith or bad faith of the prosecution"). A nondisclosure is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985). A number of witnesses (in addition to Marziano) gave testimony devastating to Ferranti: his recent reinstatement of the store's insurance policy, his removal of valuable inventory from the store the day before the fire, his procurement of a new space-heater that was not in the store prior to the fire (and was found in between

flammable liquid burn patterns), his instructions to several employees to lie to authorities concerning various matters related to the arson and his statements in the months prior to the fire that if business continued to fail he would collect on the insurance.

Ferranti also argues that the government failed in its obligation to research issues bearing upon the credibility of its witnesses (especially Marziano). [*5]However, the subject matter of the testimony was the residence of a witness who was peripatetic. In this confused situation, the government did little enough to unravel the facts, and candidly acknowledged at oral argument that more could be done. But Marziano's testimony was insufficiently crucial to Ferranti's conviction for this Court to have to decide whether the government had an obligation to do more than it did.

2. The district court calculated Ferranti's sentence by looking to U.S.S.G. § 2K1.4(c)(1) (the guideline for arson where death results), which instructs the district judge to apply the "most analogous" homicide guideline. The district court applied U.S.S.G. § 2A1.1 (the guideline for first degree murder) and downwardly departed to 435 months from the required sentence of life imprisonment because no recommendation of life imprisonment had been requested of the jury as required by the applicable version of 18 U.S.C. § 34.** On direct appeal, this Court affirmed the conviction and sentence. See United States v. Tocco, 135 F.3d 116 (2d Cir. 1998).

** The version of 18 U.S.C. § 34 applicable at the time the arson occurred provided: "Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life if the jury shall in its discretion so direct . . . ." The 1994 Amendments to

this statute struck the jury direction requirement. See Pub. L. No. 103-322 § 60003(a)(1) (1994).

[*6]

It remains unsettled in this Circuit whether Ferranti may benefit from the constitutional principle enunciated in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), as his case was pending on collateral review when Apprendi was decided by the Supreme Court. However, this issue is not squarely presented by this appeal because, even if Apprendi applies (and even if Ferranti can demonstrate cause and prejudice to overcome his procedural default) Ferranti's sentence was entirely constitutional under Apprendi.

The "resulting in death" requirement under 18 U.S.C. § 844(i) was submitted to the jury and therefore the verdict reflects a finding beyond a reasonable doubt that Lieutenant Thomas' death resulted from the alleged arson. Based on the jury's finding, Ferranti was subject to "any term of years" with a maximum of life imprisonment or death if so directed by the jury. See 18 U.S.C. § 844(i); id. § 34 (1988), amended by 18 U.S.C. § 34 (1994). Because no request was made of the jury to direct either sentence, Judge Weinstein imposed a sentence of 435[*7] months after cross-referencing the homicide provisions of Chapter Two, Part A of the Guidelines--as required by U.S.S.G. § 2K1.4--and choosing U.S.S.G. § 2A1.1 as the "most analogous" guideline. Ferranti's sentence was thus based on a factor found by the jury beyond a reasonable doubt, and was not in excess of the relevant statutory maximum. Apprendi is not implicated.

Ferranti's remaining challenge to his sentence focuses on the district judge's broad discretion (under the cross-reference provision of the arson guideline) to determine which homicide guideline is the "most analogous" based on facts not necessarily presented to the jury. This argument, which implicitly attacks the constitutionality of the Sentencing Guidelines, has been expressly rejected. See United States v. White, 240 F.3d 127, 2001 U.S. App. LEXIS 2128, at *24, 2001 WL 121081, at *6 (2d Cir. Feb. 13, 2001) (rejecting argument that Apprendi precludes the district court from looking to facts not considered by the jury in determining relevant conduct under the Guidelines). "Where, as here, factual determinations were used to sentence the defendant to a sentence within the maximum allowed by statute, Apprendi is not controlling, and such[*8] determinations can be made by the court without violating the defendant's right to due process." Id.

To the extent Ferranti reasserts that the district court's imposition of the equivalent of a life sentence violates the jury directive requirement of the applicable version of 18 U.S.C. § 34, he is precluded from relitigating this argument in a § 2255 petition as it was raised and rejected on direct appeal. See United States v. Perez, 129 F.3d 255, 260 (2d Cir. 1997) ("A § 2255 motion may not relitigate issues that were raised and considered on direct appeal."). We therefore decline to address the merits of this claim.

3. We have carefully considered Ferranti's remaining argument and find it to be without merit.

For the reasons set forth above, the judgment is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- X 99 CV 2332(JBW)

UNITED STATES OF AMERICA — Relates to 95 CR 119(JBW)

-against- — ORDER DENYING 2255 RELIEF

JACK FERRANTI,

Defendant-Petitioner.

----------X

For the reasons stated upon the record on April 27, 2000 in open Court, it is hereby ORDERED

that the Petition for relief pursuant to 28 U.S.C. 2255 is hereby denied.

SO ORDERED:

/s/

Jack B. Weinstein
United States District Judge

Dated: May 30, 2000

UNITED STATES OF AMERICA, Appellee, v. THOMAS TOCCO, Defendant, MARIO FERRANTI; JACK FERRANTI, Defendants-Appellants.

Docket Nos. 96-1266(L), 96-1282

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1998 U.S. App. LEXIS 1005

February 4, 1997, Argued

January 16, 1998, Decided

SUBSEQUENT HISTORY: As Amended February 11, 1998. As Corrected February 13, 1998.

PRIOR HISTORY: Defendant appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), convicting him, after a two-week jury trial, of arson homicide in violation of 18 U.S.C. § 844(i), arson conspiracy in violation of 18 U.S.C. § 371, 16 counts of mail fraud in violation of 18 U.S.C.§ 1341, and witness tampering in violation of 18 U.S.C. § 1512(b).

DISPOSITION: Affirmed.

COUNSEL: VIVIAN SHEVITZ, Mt. Kisco, New York (Jane Simkin Smith, Carol E. Gette, Mt. Kisco, New York, of counsel), for Appellant Jack Ferranti.

LAUREN J. RESNICK, Assistant United States Attorney, Brooklyn, New York (Zachary W. Carter, United States Attorney, Emily Berger, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), for Appellee United States of America.

JUDGES: Before: WINTER, Chief Judge, CARDAMONE and CABRANES, Circuit Judges.

OPINION: CARDAMONE, Circuit Judge:

This criminal prosecution arose out of a late-night fire in a three-story building in Queens, New York, on February 24, 1992 during which a firefighter lost his life. The subsequent investigation focused on the defendant Jack Ferranti (defendant or appellant) as the person who set the blaze in an effort to cut his losses from a failing business and to profit through the collection of insurance proceeds. Ferranti appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.), convicting him following a two-week jury trial of arson homicide in violation of 18 U.S.C. § 844(i), arson conspiracy in violation of 18 U.S.C. § 371, 16 counts of mail fraud in violation of 18 U.S.C. § 1341, and witness tampering in violation of 18 U.S.C. § 1512(b).

On appeal Ferranti raises a number of issues of apparent legal substance, one or two of which are matters of first impression, challenging his conviction for arson homicide and a sentence of 435 months in prison -- a period of time five years longer than his life expectancy. Although these legal challenges are skillfully articulated, they turn out, upon close analysis, to be unpersuasive and only hopeful thoughts. Therefore, for the reasons given below, we affirm.

BACKGROUND

I The Fire

Defendant Jack Ferranti owned a retail clothing store called "Today's Styles" which he operated in space he rented on the ground floor of a building located at 64-65 Grand Avenue in Maspeth, Queens. The two upper floors of the building consisted of four occupied residential apartments that housed eight people. At 5 p.m. on February 24, 1992 store employee Teresa Rodriguez closed the store. Just before 11 p.m., a witness saw smoke pouring out from the side of the building and called the fire department. When it responded and the fire trucks arrived at the scene, two firefighters entered the building and went to the second floor to see if any people were trapped inside. During the search one of the firefighters fell to his death from a second-story window. Two dozen other firefighters suffered minor injuries, and several building residents were treated for smoke inhalation. The structure was destroyed, its residents left

homeless.

After successfully fleeing the burning building, two residential tenants, Shelley and Michelle Anthony, spoke briefly with a man who asked them if all of the residents had escaped the fire. From a series of photographs, Shelley Anthony later identified defendant Thomas Tocco as the man with whom he spoke on the night of the fire. Although unable to make a definitive identification, Tocco's photograph was one of two or three that Michelle Anthony selected from the series presented to her.

The following morning investigators found evidence indicating that the fire was arson committed by someone with access to the retail store because there was no evidence of forced entry. Two distinct flammable liquid patterns were found on the floor of the dressing room area in the rear of the retail store that investigators believed had been intentionally placed several feet apart and ignited. Between the two patterns was a portable electric heater plugged into the wall. Investigators concluded that whoever set the fire intended to lead them to believe that it was caused by a malfunction in the heater. Testing by the FBI laboratory, however, found no evidence to suggest that the heater's circuit was "energized" at the time of the fire, *i.e.*, there was no electrical arcing, and therefore investigators concluded that the unit could not have been the cause of the fire's ignition.

Ferranti initially told investigators that he had been out of town for several days when the fire occurred. He also said that a former employee, whom he had since fired, had purchased the heater for the store a couple of years earlier. When questioned by police, that employee denied making such a purchase. While Rodriguez, a current employee, initially told police there had been a portable heater at the store, her friend, Betzida Aviles, who had been at the store on the day of the fire, told police that there was no heater there. Before the grand jury, Ms. Rodriguez recanted, testifying that Ferranti had met with her on the morning after the fire at his real estate office in Manhattan and instructed her to lie to the investigators and tell them that there had been a portable electric heater at the store.

In the weeks following the fire, Ferranti filed a claim with

his insurance company under his fire policy. The company asked attorney Stuart Markowitz to handle its investigation of the Today's Styles fire, and Markowitz corresponded with Ferranti and his representative requesting information about the fire. On June 11, 1992 after the company had examined Ferranti under oath and requested an examination of employee Rodriguez, Ferranti wrote the company withdrawing his insurance claim.

Defendant was subsequently indicted, along with his brother, Mario Ferranti, and Thomas Tocco, on charges of arson homicide, arson conspiracy, witness tampering, and mail fraud. Ferranti and his brother successfully moved for severance, and their case proceeded to trial separately from co-defendant Tocco.

II The Trial Proceedings

At trial the government developed the connection between defendant Ferranti, his brother Mario, and Tocco. In addition to the Anthonys' identification of Tocco at the fire scene, another witness testified that she had seen a dark-colored Cadillac matching the description of Tocco's car parked across the street from the building 10 to 15 minutes before she noticed smoke coming from inside it. She also stated that when she later observed the fire, the Cadillac was gone. Government witness Vincent Marziano, a convicted felon and friend of Tocco and Mario Ferranti, provided the link between Tocco and Ferranti. Marziano testified that at 2 a.m. on the night of the fire, Tocco came to his Bronx home and told him that he and Mario Ferranti had just set a Queens building on fire for Jack Ferranti. One week later, Marziano warned Mario Ferranti that Tocco had confessed their crime to him, and Mario responded by nodding his head affirmatively.

The government also produced evidence of Jack Ferranti's motive: to obtain an insurance award for an ailing business. Although he carried no insurance on his other store, Jack Ferranti renewed Today's Styles' fire policy, which had lapsed at the end of 1991, in the weeks immediately preceding the fire. He had informed investigators that his business was doing well, but evidence at trial -- including a business diary and testimony of the store's employees -- indicated that business had been extremely slow. Moreover,

Ferranti had been unable to pay rent, which was scheduled to increase, on the store's five-year lease for the three months preceding the arson. Firefighters and insurance adjusters who inspected the building after the blaze discovered empty clothes racks with little debris beneath them, indicating that inventory had been removed from the store prior to the fire.

In addition to this circumstantial evidence, the government called as a witness Lisa Ziccardi, who testified that in the months prior to the fire, Jack Ferranti had told her that he would burn the heavily-insured store if business did not improve. Ziccardi had submitted a signed affidavit to investigators reporting Ferranti's statements and had similarly recounted his statements to an insurance company investigator. Yet, in the government's initial examination of her, she claimed a memory loss regarding Ferranti's statements, even when confronted with her own sworn, hand-written affidavit. Judge Weinstein subsequently held a hearing -- outside the jury's presence -- at which he concluded Ziccardi was feigning memory loss as the result of coercion by Ferranti. Because the defendant had effectively made her unavailable as a witness, the trial court ruled her sworn affidavit would be admissible as substantive evidence, under Fed. R. Evid. 803(5), if her feigned memory loss continued. When Ziccardi was recalled to the stand, she reluctantly stated that she remembered hearing Ferranti state his intention to set fire to the business. Because Ziccardi now recalled and testified to Ferranti's prior statements, Judge Weinstein denied the government's motion to introduce into evidence her sworn affidavit.

Jack Ferranti's defense consisted primarily of two experts who challenged the conclusion that the fire was intentionally set. First, Thomas Klem, a former employee of the National Fire Protection Association, testified that the fire could have been caused by an electrical short in the building since he had observed evidence of electrical arcing on the electrical outlet that was connected to the portable heater -- evidence which he asserted had been subsequently altered. Second, Michael Higgins, who was called by the defense as a chemical expert, testified that the police reports did not conclusively establish that traces of a flammable accelerant were present in the materials taken from the store. But Higgins conceded

that the large quantities of water used to extinguish a fire may wash away the chemical evidence of an accelerant.

The jury convicted Ferranti of arson homicide, arson conspiracy, 16 counts of mail fraud, and witness-tampering for his intimidation of Rodriguez prior to her grand jury testimony. The jury convicted his brother Mario Ferranti of arson conspiracy. Jack Ferranti moved unsuccessfully before the district court after trial to vacate his convictions on the grounds that the government's proof on the interstate commerce nexus to support the arson homicide charge was insufficient and that the mailings alleged in the indictment were too remote to constitute mail fraud.

After a lengthy restitution hearing, the district court sentenced Ferranti on the arson homicide conviction to 435 months in prison and five years of supervised release. On the remaining counts of conviction, that is, conspiracy to commit arson, mail fraud, and tampering with a witness, the district court imposed the statutory maximum sentences, with each to run concurrently with the arson homicide sentence. Judge Weinstein additionally ordered Ferranti to pay: (1) restitution in the amount of $ 1,455,799.79, pursuant to 18 U.S.C §3663; (2) a statutory fine of $ 2,911,599.58 (twice the restitution amount), pursuant to 18 U.S.C.§3571(d); (3) a $ 318,037.57 fine for the costs of imprisonment, pursuant to U.S.S.G. § 5E1.2(i) (with money to be deducted to cover support for Ferranti's former wife and child if such a need is properly certified); and (4) a total amount of $ 950 in special assessments ($ 50 for each of the 19 counts), pursuant to 18 U.S.C. § 3013(a)(2)(A).

Ferranti challenges his conviction and his sentence on numerous grounds, each of which we address in the following discussion. Although his brother Mario filed a notice of appeal, he subsequently moved to withdraw his appeal.

ANALYSIS

I Sufficiency of the Evidence

Ferranti challenges his arson homicide, mail fraud, and witness tampering convictions on the ground of insufficient evidence. A defendant challenging a conviction for insufficient evidence bears a heavy burden, *United States v. Russo*, 74 F.3d 1383, 1395 (2d Cir.), *cert. denied*, 136 L. Ed. 2d 213, 117 S. Ct. 293

(1996), because we view the evidence in the light most favorable to the prosecution. *See United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989). We defer to the jury's resolution of witness credibility and, where there is conflicting testimony, to its selection between competing inferences. See *United States v. Pelaes*, 790 F.2d 254, 259 (2d Cir. 1986). A conviction so challenged must be affirmed when we believe "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, (1979); *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997).

A. Arson Conviction

Ferranti contends there is insufficient proof to support the interstate commerce element of the arson homicide offense. *Citing United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), he urges that to support a conviction under the federal arson statute, 18 U.S.C. §844(i), the government must establish the criminalized activity's substantial impact on interstate commerce.

In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act, 18 U.S.C. §922(q)(1)(A), a statute criminalizing the knowing possession of a firearm in a school zone, on the ground that Congress exceeded its powers under the Commerce Clause when it enacted the statute. The Court found problematic the fact that the statute "neither regulated a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce." 115 S. Ct. at 1626. In particular, the Court emphasized that the Gun-Free School Zones Act "contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." Id. at 1631. Unlike the statute in *Lopez*, the federal arson statute does contain such a jurisdictional element, which provides that

> whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . . .

18 U.S.C. §844(i) (emphasis added). In considering other federal criminal statutes containing jurisdictional elements, we have held that Lopez did not elevate the government's burden in proving a nexus to interstate commerce. *See United States v. Farrish*, 122 F.3d 146, 149 (2d Cir. 1997) ("We find nothing in *Lopez* to suggest that the Court intended to heighten the threshold for establishing jurisdiction under such statutes."); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir.) (holding that Lopez did not raise the government's burden under the federal money laundering statute, 18 U.S.C. § 1956(a)(3)(B), which contains a jurisdictional element requiring the financial transaction to affect interstate or foreign commerce "in any way or degree"), *cert. denied*, 117 S. Ct. 1713 (1997). We hold that in light of the fact that, unlike the statute in Lopez, § 844(i) does contain a jurisdictional element, *Lopez* did not elevate the government's burden in establishing jurisdiction in a federal arson prosecution. *See United States v. Flaherty*, 76 F.3d 967, 974 (8th Cir. 1996) ("The *Lopez* decision did not address the amount of evidence required to prove an explicit jurisdictional element of an offense and does not control this case."). Hence, to satisfy § 844(i) the government need only prove that the arson in question destroyed or damaged property either "used in" or "used in any activity affecting" interstate commerce.

Sufficient evidence to establish the interstate commerce nexus for the arson homicide offense was produced in this case. In *Russell v. United States*, 471 U.S. 858, 862, 85 L. Ed. 2d 829, 105 S. Ct. 2455 (1985), the Court established a *per se* rule that, for purposes of § 844(i), rental property constitutes property that is used in an activity affecting interstate commerce. Inasmuch as §844(i) contains a jurisdictional element, distinguishing it from the type of statute addressed in Lopez, we see no reason to conclude, as Ferranti apparently would have us do, that Lopez overruled the Court's holding in *Russell*. *See United States v. DiSanto*, 86 F.3d 1238, 1248 (1st Cir. 1996) ("We find no basis to conclude that *Lopez* in any way undercuts *Russell's* holding that rental property is unquestionably an activity that affects interstate commerce within the meaning of 18 U.S.C. § 844(i)."), *cert. denied*, 137 L. Ed. 2d 310, 117 S. Ct. 1109 (1997). Under the jurisdictional standard

outlined in § 844(i), the government offered enough proof to allow a rational jury to conclude that the building was rented for both commercial and residential purposes at the time of the arson, thereby conclusively establishing the requisite connection between the burned building and interstate commerce.

B. Mail Fraud Convictions

The jury convicted appellant on 16 counts of mail fraud (counts 3 through 18 of the indictment) based on mailings he made in order to obtain money fraudulently from his insurance company. He challenges 15 of those 16 counts. While conceding that the mailing charged in count 14 -- the proof of loss form -- was made in furtherance of the fraudulent scheme, he maintains that the mailings underlying the remaining counts are too remote to support conviction.

Underlying the discussion of these mail fraud convictions is the rule that a person who launches a fraudulent scheme through the use of the mails is criminally liable for all consequent mailings that occur. This rule is logical but severe -- likened perhaps to the tyranny of inertia -- which in this case ensnared defendant in further mail fraud counts beyond his initial mailing even though, for reasons of his own, he would have stopped if he could that which he had originally started.

A mail fraud conviction under 18 U.S.C. § 1341 requires proof that there was (1) a scheme to defraud (2) furthered by use of the mails (3) for the purpose of obtaining money or property. *United States v. Altman*, 48 F.3d 96, 101 (2d Cir. 1995). Ferranti contests only the second prong. To meet prong (2) the government must show that the defendant caused the mailing and that it was in furtherance of a fraudulent scheme. *See United States v. Slevin*, 106 F.3d 1086, 1089 (2d Cir. 1996).

We have construed § 1341's causation requirement liberally. *See, e.g., United States v. Bortnovsky*, 879 F.2d 30, 38-39 (2d Cir. 1989). In order to show that the defendant "caused" the mailing, it need only be shown that he acted "with knowledge that the use of the mails will follow in the ordinary course of business," or that "such use can reasonably be foreseen, even though not actually intended." *Pereira v. United States*, 347 U.S. 1, 8-9, 98 L.

Ed. 435, 74 S. Ct. 358 (1954). Moreover, a mailing is in furtherance of a fraudulent scheme when it is "incidental to an essential part of the scheme," see id. at 8, or "a step in [the] plot," *Badders v. United States*, 240 U.S. 391, 394, 60 L. Ed. 706, 36 S. Ct. 367 (1916). A fact-specific inquiry must be made to determine intent, that is to say, "whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time." *Schmuck v. United States*, 489 U.S. 705, 711, 715, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989).

We have said, in general, that regardless of the identity of the sender, mailings sent in connection with an ordinary insurance claims process are related to an insurance fraud scheme. *See, e.g., Bortnovsky*, 879 F.2d at 39-41 (determining that a letter from insurance adjuster advising defendants to preserve their rights was in furtherance of fraudulent scheme). Conversely, a mailing that places the defrauded insurer on notice of the fraud, impedes the execution of the fraud, or discloses the nature of the fraud, may not be said to be in furtherance of a fraudulent scheme. *See United States v. Koen*, 982 F.2d 1101, 1107 (7th Cir. 1992); *United States v. Pacheco-Ortiz*, 889 F.2d 301, 305 (1st Cir. 1989); *United States v. Leyden*, 842 F.2d 1026, 1030 (8th Cir. 1988).

We are persuaded here that the evidence supports Ferranti's conviction on all of the mail fraud counts. The use of the mails alleged in counts 3 through 18 -- correspondence regarding insurance reimbursement following an initial request -- was clearly foreseeable. Further, that use was in furtherance of defendant's fraudulent scheme. To explain how the various mailings were in furtherance of Ferranti's fraudulent scheme, we divide them into the following five categories: (1) Requests for Information; (2) Letter of Representation; (3) Confirmation Letters; (4) Letter Acknowledging Receipt of Proof of Loss; (5) Letter Withdrawing the Insurance Claim.

(1) Requests for Information: Counts 3, 4, 5, 6, 16 and 17. The mailings in counts 3 and 5 were letters sent to Ferranti on behalf of the insurer requesting information regarding the store's financial situation, Ferranti's alibi, and the names of employees who might assist in the investigation of the fire. Counts 4 and 6 related to letters sent to defendant on behalf of the insurer requesting him to file a

sworn statement in proof of loss and attend a deposition. Similarly, the count 16 mailing was another request for information made to Ferranti's attorney on behalf of the insurer. Count 17 concerned a mailing sent to defendant's former employee on behalf of the insurer requesting the deposition of that employee.

Mailings related to an insurance investigation that are a part of the customary steps taken by an insurance carrier to decide whether to pay a claim under a policy, and not for the purpose of defeating the claim, are in furtherance of the fraudulent scheme under § 1341. *Koen*, 982 F.2d at 1109-10; *see also United States v. McClelland*, 868 F.2d 704, 708-09 (5th Cir. 1989); *cf. United States v. Castile*, 795 F.2d 1273, 1280 (6th Cir. 1986) (letter rejecting proof of loss and denying claim not in furtherance of scheme). A rational jury could conclude that these mailings involved routine requests for information needed to advance the insurer's normal claim processing and therefore furthered the scheme.

Alternatively, Ferranti attacks his convictions on counts 4 and 6 as being cumulative, since both mailings requested essentially the same information from Ferranti and the letter charged in count 6 was mailed to Ferranti at a new address only after the letter charged in count 4 was returned to the sender. A factfinder could reasonably find that the original letter of count 4 was properly sent to Ferranti, but that Ferranti refused to accept it, thereby precipitating the need to mail the second letter that formed the basis for count 6. As a result, both letters would be in furtherance of the fraudulent scheme.

(2) Letter of Representation: Count 13. Count 13 concerned a mailing by Ferranti's attorney to the insurance company informing the insurer of his representation of Ferranti. This letter was made in furtherance of the fraudulent scheme because it served to facilitate correspondence during the course of the insurance claim process.

(3) Confirmation Letters: Counts 7, 8 and 9 and 10, 11 and 12. These six mail fraud counts are predicated on the mailing of three copies each of two letters. Counts 7 through 9 were based on a letter mailed on behalf of the insurer confirming the oral rescheduling of Ferranti's deposition. A copy of this letter was sent

to Ferranti's two known addresses as well as to Ferranti's public adjuster representative, Henry Gritz. Counts 10 through 12 were based on a letter mailed on behalf of the insurer confirming the oral re-rescheduling of Ferranti's deposition. Again, two copies were sent to Ferranti, and one copy was sent to representative Gritz.

Ferranti attacks his convictions under these counts on two grounds. First, he characterizes these mailings as mere confirmations of prior oral statements that therefore cannot be considered as being in furtherance of the fraudulent scheme. On the contrary, these confirmations were part of the routine insurance claims process that furthered the collection scheme by informing Ferranti of his scheduled deposition. *See McClelland*, 868 F.2d at 707-08 (reasoning that a confirmation of an oral statement made during a routine insurance claims process could provide a basis for a mail fraud conviction). A rational jury could find that the confirmation letter was sent to reschedule Ferranti's deposition so that his claim could be processed. This is especially true given the fact that the initial oral communications rescheduling Ferranti's deposition did not directly involve Ferranti.

As an alternative challenge, Ferranti contends that even if the letters can serve as the basis for mail fraud convictions, each of the two letters supports only one conviction. However, separate mailings of the same document may support separate convictions under § 1341 when each is a necessary and reasonable step in the claim process. *United States v. Draiman*, 784 F.2d 248, 253 (7th Cir. 1986). As a result of Ferranti's complaint that he had not received an earlier mailing from the insurance company (i.e., the prior mailing involved in count 4), the insurer mailed a copy of each confirmation to Ferranti's representative and to Ferranti's two known addresses to ensure that Ferranti would receive each confirmation. Our reading of the record persuades us that a reasonable jury could believe that these mailings in triplicate were part of routine claim processing and thus furthered his scheme.

(4) Letter Acknowledging Receipt of Proof of Loss: Count 15. Count 15 concerns a letter to Ferranti's attorney on behalf of the insurer acknowledging the receipt of the proof of loss forms. These acknowledgement forms were also part of routine insurance claim

processing.

(5) Letter Withdrawing the Insurance Claim: Count 18. Finally, Ferranti's challenge to his conviction on count 18 gives us pause. This conviction was based on a letter written by Ferranti's attorney withdrawing his insurance claim in an effort to cover-up his unsuccessful scheme. The government urges that because withdrawal was essential for the successful cover-up of the unsuccessful scheme, this mailing was in furtherance of the scheme. We agree that a mailing is in furtherance of a scheme when "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States v. Lane*, 474 U.S. 438, 451-52, 88 L. Ed. 2d 814, 106 S. Ct. 725 (1986) (*quoting United States v. Maze*, 414 U.S. 395, 403, 38 L. Ed. 2d 603, 94 S. Ct. 645 (1974)). Although in the case at hand, Ferranti's withdrawal letter ended his unsuccessful scheme to obtain insurance proceeds fraudulently, the attempt at concealment was directed at avoiding -- or perhaps, more accurately, limiting -criminal liability. A factfinder could reasonably conclude that the withdrawal letter was designed to make the company feel secure that this fireloss claim was no longer being advanced and defer any complaint to the authorities about the defendant that their investigation of the fire had uncovered, thus making his apprehension less likely. Consequently, this conviction must also be affirmed.

C. Witness-Tampering Conviction

Ferranti challenges his witness-tampering conviction on the ground that there was insufficient evidence to establish that he attempted to persuade witness Rodriguez, a store employee, to lie before the grand jury. An individual tampers with a witness in violation of 18 U.S.C. § 1512(b) when he "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding."

Although appellant admits that on the day after the fire he instructed Ms. Rodriguez to tell the police that there had been a

heater in the store, he says there is no proof of any intimidation by him specifically directed at her grand jury testimony. He contends that because Rodriguez reported no pressure from him in the 15 months that elapsed from the time of the fire until her grand jury testimony, no rational jury could find him guilty of witness tampering. Ferranti's marshalling of the evidence, however, does not meet the heavy burden imposed on a defendant challenging a conviction based on an insufficiency of the evidence.

Circumstantial evidence was proffered from which the jury could infer that appellant corruptly attempted to influence Rodriguez' testimony before the grand jury. Rodriguez, who was a tenant in one of Ferranti's buildings, was also his employee at the Today's Styles store. The jury could reasonably have believed that as her landlord and her employer, he had a strong influence over her. Although Rodriguez testified at trial that she alone retained her attorney on the advice of her sister-in-law after receiving the grand jury subpoena, there was proof that her sister-in-law was also a Ferranti employee, that Rodriguez' financial resources were insufficient to cover the $500 cash payment made to the attorney at their initial meeting, and that Ferranti accompanied her to the attorney's office for that meeting. From this, the jury could reasonably infer that after Rodriguez received a grand jury subpoena, appellant secured and paid for an attorney for her. Further, when Rodriguez testified at Ferranti's criminal trial, the jury had an opportunity to observe her demeanor in appellant's presence. In short, Ferranti's § 1512(b) conviction for witness tampering is amply supported by the record.

II Evidentiary Rulings

Ferranti contends that Marziano's testimony recounting Tocco's confession of his and Mario Ferranti's involvement in the fire was inadmissible hearsay admitted in violation of the Confrontation Clause. He also avers that Tocco's statement regarding Mario Ferranti's affirmative nod in response to Marziano's account of what Tocco had said was improperly admitted as an adoptive admission under Fed. R. Evid. 801(d)(2)(B). In addition, appellant takes issue with the district court's determination that, in light of Ziccardi's functional unavailability as a witness, her prior sworn statements before the grand jury were admissible. We consider each

evidentiary issue in turn.

A. Tocco's Statement to Marziano

At trial, Marziano testified that Tocco came to his house at 2 a.m., within three hours after the fire began, and confessed that he and Mario Ferranti had set fire to a Queens building for Mario's brother Jack. The government suggested three different theories under which this statement could be admitted: (1) as a declaration against Tocco's penal interest under Fed. R. Evid. 804(b)(3); (2) as an excited utterance under Fed. R. Evid. 803(2); and (3) as an inherently reliable statement under Fed. R. Evid. 804(b)(5)'s residual exception to the hearsay rule. Appellant asserts that none of these theories is valid and that the district court erred in allowing Marziano to testify with respect to the statement.

Admissibility determinations are reviewed under an abuse of discretion standard. *United States v. DeVillio*, 983 F.2d 1185, 1189 (2d Cir. 1993). Because we are of the view that it was not an abuse of the trial court's discretion to admit the statement as an excited utterance exception to the hearsay rule, we do not address the remaining theories of admissibility.

An excited utterance is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fed. R. Evid. 803(2). The rationale for this hearsay exception is that the excitement of the event limits the declarant's capacity to fabricate a statement and thereby offers some guarantee of its reliability. An excited utterance need not be contemporaneous with the startling event to be admissible under Rule 803(2). *See, e.g., United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (five or six hours between beating and statement).

Judge Weinstein believed Tocco's statement to Marziano qualified as an excited utterance. The record amply supports this finding. The fire itself may constitute a startling event, but even if it did not, certainly Tocco's subsequent realization that people could be trapped inside the burning building, which he had helped set, would comprise a startling event. This knowledge was imparted to Tocco at 11:00 p.m., when the Anthonys told him that some people had remained in the burning building. Within three hours of this

discovery, Tocco arrived at Marziano's residence, knocking on Marziano's window and exclaiming, "Mario and I lit a building for Jack." Tocco's excitement obviously had not subsided at that time. During his testimony, Marziano described Tocco's demeanor that morning as "all hyped" and "nervous." Under these circumstances, Tocco's statement was properly received as an excited utterance under Fed. R. Evid. 803(2).

Appellant also challenges the portion of the statement implicating himself *(i.e.*, the "for Jack" portion) as being improperly admitted because the prosecutor had failed to prove that Tocco had personal knowledge that he and Mario Ferranti had set the fire for defendant. The applicable rule of evidence, Fed. R. Evid. 602, states, in relevant part, that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The test is "whether a reasonable trier of fact could believe the witness had personal knowledge." *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 764 (2d Cir. 1991). The record shows that while neither Tocco nor Mario Ferranti had an ownership interest in the Queens clothing store, a key was used to enter the store on the night of the arson. A trier of fact could reasonably believe that Tocco obtained the key from the store owner and therefore was aware that the arson was committed at the owner's direction. Further, witnesses testified that when Ferranti required help with his properties, he typically solicited his brother Mario who, in turn, recruited his friends. A factfinder could have reasonably decided, based upon this evidence, that Tocco had personal knowledge that he and Mario Ferranti had set the fire for the defendant, Jack Ferranti.

Even though Tocco's entire statement is admissible under the Federal Rules of Evidence, appellant declares that its admission violated his constitutional rights under the Confrontation Clause. This argument is without merit. The Supreme Court teaches that the Confrontation Clause and the hearsay rules are both "generally designed to protect similar values." *Bourjaily v. United States*, 483 U.S. 171, 182-83, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987). As a result, certain "firmly rooted" hearsay exceptions, ones that carry sufficient indicia of reliability and trustworthiness, will inevitably

satisfy the Confrontation Clause. *White v. Illinois*, 502 U.S. 346, 356, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992). An excited utterance is one such firmly established exception that escapes independent Confrontation Clause analysis. Id. at 357. Although the Supreme Court refers to "spontaneous declarations" throughout its opinion in White v. Illinois, it is clear the Court is discussing excited utterances, which do not require absolute contemporaneity with the event described. We say that because the Court directly refers to Fed. R. Evid. 803(2), the excited utterance exception, id. at 355 n.8, and also refers to a statement "offered in a moment of excitement," id. at 356. As a result, appellant's Confrontation Clause challenge lacks merit because Tocco's statement is admissible as an "excited utterance."

B. Testimony About Mario's Nod

Ferranti next challenges the trial court's decision to allow Marziano to testify as to Mario's nod in response to Marziano's account of Tocco's admission. Ferranti thinks this was error because the nod was ambiguous. This evidentiary ruling is reviewed for abuse of discretion. *United States v. Aponte*, 31 F.3d 86, 87 (2d Cir. 1994).

An innocent person accused of being involved in a crime will ordinarily deny such involvement or, at least, assert that the incriminatory statement is untrue. *United States v. Shulman*, 624 F.2d 384, 390 (2d Cir. 1980). Absent circumstances that render it more probable that a person would not respond to an accusation against him than that he would, such person's silence or other ambiguous conduct is admissible as an adoptive admission under Fed. R. Evid. 801(d)(2)(B). *United States v. Flecha*, 539 F.2d 874, 877 (2d Cir. 1976). Marziano testified that he cautioned defendant's brother, while the two of them were alone in an alley behind a bar, that Tocco was talking about their involvement in the arson. This is exactly the type of statement that an innocent person, under these circumstances, would normally deny. *See, e.g., United States v. Williams*, 577 F.2d 188, 194 (2d Cir. 1978) (reasoning that where defendant did not "vigorously assert[ ]" his non-involvement in a conspiracy, his statements could constitute an adoptive admission). But Mario Ferranti nodded his head affirmatively in response to the

warning. Thus, the court's ruling that Mario's nod constituted an adoptive admission about which Marziano could testify was not an abuse of its discretion.

The so-called ambiguity surrounding the meaning of Mario Ferranti's nod does not undermine the district court's admissibility determination. This evidentiary determination was preliminary to a decision as to what inference should be drawn from it, which was ultimately a question for the jury to assess, rather than for an appellate court. *See* Fed. R. Evid. 104(b); see also 8 Weinstein's *Federal Evidence* § 801.21[3] (2d ed. 1997).

C. Admissibility of Lisa Ziccardi's Prior Statements

Another evidentiary decision which has come under attack is the decision to admit Lisa Ziccardi's prior sworn affidavit in which she stated that Ferranti told her he intended to burn down his store for insurance money. When Ziccardi was initially called to testify at defendant's trial, she stated she was unable to recall Ferranti's prior statements even when shown her own affidavit. After a hearing outside the jury's presence, Judge Weinstein ruled that Ferranti had effectively procured the absence of a witness, and held that the affidavit would be admissible if she continued to feign memory loss. *See United States v. Mastrangelo*, 693 F.2d 269, 272 (2d Cir. 1982) (reasoning that where, after an evidentiary hearing, the district court finds that defendant procured the absence of a witness, that witness' out-of-court statements are admissible on the ground that defendant waived his Sixth Amendment right to confront the witness by his misconduct). Appellant contends Ziccardi's refusal to confirm her prior statements did not constitute absence within the meaning of *Mastrangelo*, and therefore it was error to rule the affidavit admissible. We need not address this issue because the affidavit was never admitted into evidence against appellant since after the court's ruling, Ziccardi returned to the witness stand and reluctantly testified to Ferranti's statements. As a result, the court thereafter denied the government's motion to introduce her sworn affidavit as substantive evidence.

III Deprivation of Fair Trial Claim

Ferranti next asserts that he was denied a fair trial as a result of prosecutorial misconduct, in combination with the trial

judge's treatment of Ziccardi discussed above, that conveyed his disbelief of the defense's case.

A. The District Court's Treatment of Ziccardi

We see no prejudice to appellant in the district court's actions vis-a-vis witness Ziccardi. The admissibility ruling was made outside the jury's presence and therefore could not have conveyed any message of Judge Weinstein's alleged disbelief to the jury. With respect to the court's questioning of Ziccardi, it is settled law that a trial judge may actively participate in questioning to clarify ambiguities, correct misstatements, or obtain information necessary to make rulings. When a judge's conduct is challenged as displaying bias against the defendant, the entire record must be examined to determine whether the jurors have been so impressed by the judge's partiality that it affected their deliberations. *See United States v. Filani*, 74 F.3d 378, 385-86 (2d Cir. 1996). Our review of the record as a whole satisfies us that Judge Weinstein's participation did not demonstrate bias or deny Ferranti a fair trial.

B. Alleged Prosecutorial Misconduct

We next address Ferranti's allegations of prosecutorial misconduct during the government's examination of Marziano and during its rebuttal summation. In order to prevail on such a claim a defendant must demonstrate that the prosecutor's inappropriate comments caused "substantial prejudice." *United States v. Bautista*, 23 F.3d 726, 732 (2d Cir. 1994). To determine whether substantial prejudice exists, we weigh the severity of the alleged misconduct, the measures adopted to cure it, and the certainty of conviction absent the misconduct. *See Russo*, 74 F.3d at 1396.

Ferranti declares first that the prosecutor made an improper reference to other evidence during the government's examination of Marziano. Specifically, the prosecutor asked Marziano whether he was "aware" that the government had "a lot of other evidence" and could "figure out whether or not [Marziano] was being accurate." The comments embodied in this question were arguably improper, but we think no substantial prejudice resulted. The jury was promptly given curative instructions to disregard the statement and told repeatedly that it should only consider the evidence presented at the trial. Further, there was ample evidence,

absent this comment, to support appellant's convictions.

The remaining claim of prosecutorial misconduct centers on the government's rebuttal summation. Appellant alleges the prosecutor placed his own credibility at issue, argued facts not in evidence, accused the defense of slandering the victims, vouched for a government witness, and made inflammatory comments about defense counsel and a defense expert witness. The prosecution and the defense are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence. *United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994). Under the invited or fair response doctrine, the defense summation may open the door to an otherwise inadmissible prosecution rebuttal. *See United States v. Robinson*, 485 U.S. 25, 32, 99 L. Ed. 2d 23, 108 S. Ct. 864 (1988). In particular, where the defense summation makes arguments and allegations against the government, the prosecutor may respond to them in rebuttal. *See United States v. Rivera*, 971 F.2d 876, 883 (2d Cir. 1992); *United States v. Bagaric*, 706 F.2d 42, 60 (2d Cir. 1983). We review the allegedly improper prosecutorial statements during summation in the context of the entire argument before the jury to determine whether the defendant was deprived of a fair trial. *United States v. Pena*, 793 F.2d 486, 490 (2d Cir. 1986).

Each of the challenged statements in the prosecution's rebuttal were fair responses to the defense summation. Defendant cannot now complain about the issues raised and the atmosphere created by his own making through the defense summation. To the extent that any of the comments could be labelled improper, none were so egregious as to infect the proceedings in such a manner as to deprive defendant of due process of the law. *See Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986).

IV Challenges to the Sentence

A. Applicable Guideline for Arson Homicide

Ferranti was sentenced to 435 months in prison and ordered to pay restitution and a hefty fine. His first challenge to his sentence is the district court's use of U.S.S.G § 2A1.1 as its basis. Guidelines § 2K1.4 governs sentencing for arson homicide. When arson results in death, "or the offense was intended to cause death or

serious bodily injury," § 2K1.4(c)(1) directs the sentencing court to apply the guideline listed in Chapter Two, Part A, the section of the Guidelines dealing with homicide, that is most analogous to the arson offense. Appellant urges that since in this case the fireman's death was unknowingly and unintentionally caused, the sentencing court erred in relying on § 2A1.1, the first-degree murder guideline, as the basis for his sentence on the arson conviction.

This contention is without merit. Section 2A1.1 applies to any death which "results from the commission of certain felonies." *See* U.S.S.G. §2A1.1, comment. (n.1). The application notes identify the federal felony murder statute, 18 U.S.C. §1111, as suggestive of which felonies are included. That statute defines first-degree murder as a killing "committed in the perpetration of, or attempt to perpetrate, any arson . . . ." 18 U.S.C. § 1111(a). Hence, since death resulted from arson, the Guidelines authorize the sentencing court to apply the guideline for first-degree murder based upon that court's assessment of the facts surrounding the arson homicide. Contrary to defendant's suggestion, this discretion in imposing sentence does not create an impermissible ambiguity in the Guidelines requiring application of the rule of lenity. *Cf. United States v. Canales*, 91 F.3d 363, 367 (2d Cir. 1996) ("The rule of lenity requires the sentencing court to impose the lesser of two penalties where there is an actual ambiguity over which penalty should apply.").

Ferranti continues the challenge to his sentence by arguing that, even if §2A1.1 is applicable, the district court should have departed downward based on the facts of this case. Under § 2A1.1, a sentencing court is free to depart downward "if the defendant did not cause the death intentionally or knowingly." U.S.S.G. § 2A1.1, comment. (n.1). In the absence of an error of law or an erroneous belief on the part of the sentencing court that it had no power to depart, the district court's refusal to grant a downward departure and the extent of its departure are not appealable. *See United States v. Hendron*, 43 F.3d 24, 26 (2d Cir. 1994) (*per curiam*).

In light of this standard, defendant attacks the district court's failure to downwardly depart under § 2A1.1 as an error of law on the ground that he did not "knowingly or intentionally" cause the firefighter's death. Yet, a plain reading of § 2A1.1's commentary

refutes this claim. It says that "a downward departure may be warranted" if the defendant did not intend to cause death. U.S.S.G. § 2A1.1, comment. (n.1) (emphasis added). The sentencing court was well aware of its discretionary power to depart under § 2A1.1, but chose not to do so after specifically identifying several aggravating factors, e.g., Ferranti's scheme to defraud an insurance carrier, his knowledge of tenants' presence in the building, the use of an accelerant, and his decision to set a building that was in part residential afire at night. In sum, we have no basis for reversing the district court's decision not to depart downwardly under § 2A1.1.

B. The Jury Directive Requirement

The district court did depart downwardly (from a life sentence), but it did so in order to avoid complying with 18 U.S.C. § 34's requirement that a jury approve of the life sentence mandated by § 2A1.1's base level offense of 43. The applicable version of § 34 provides:

> Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.

18 U.S.C.§ 34 (1988), *amended by* 18 U.S.C. § 34 (1994). The plain language of this section authorizes the imposition of a life sentence only by jury recommendation in the absence of a plea. Such a recommendation was never requested of the jury in this case.

Instead, the district court departed downward to base offense level 42, which provides for a term of imprisonment from 360 months to life under the appropriate criminal history category. In its calculation of Ferranti's sentence, the court determined that the 43-year old Ferranti's life expectancy was 31 years, or 372 months, from the time of sentencing. After considering the total amount of good-time credit to which he would be entitled, see 18 U.S.C. § 3624(b) (1994) (effective Nov. 1, 1987) (allowing 54 days of

good-time credit per year), Judge Weinstein sentenced Ferranti to 435 months -- 5 years more than his life expectancy. With 64.3 months of good-time credit considered, Judge Weinstein determined that Ferranti's actual term of imprisonment would be 371 months from the time of his arrest, a period of time one month short of his life expectancy.

Appellant insists that his 435-month sentence violates § 34 because it exceeds his life expectancy, despite the fact that the sentence that he is likely to serve after receiving good-time credits is less than his life expectancy. The question before us is whether the maximum good-time credits should be deducted from a formal sentence in determining whether that sentence complies with §34. Ferranti's only argument against consideration of the good-time credits is that he is not yet entitled to them and therefore is not guaranteed release after a term of imprisonment less than his life expectancy.

While it is true that a defendant is not entitled to such credit, *see* 18 U.S.C. § 3624(b) (a prisoner "may receive" good-time credit subject to the Bureau of Prisons' determination that he has displayed "exemplary compliance with such institutional disciplinary regulations"), we decline to adopt Ferranti's interpretation of § 34 that would, in effect, allow defendants to argue that they should receive a shorter formal sentence because they plan to disregard prison rules and thus fail to earn good-time credit. In holding that the district court does not violate § 34 when it considers maximum good-time credit in its calculation of a defendant's sentence, we join another circuit that has already done so. *See United States v. Gullett*, 75 F.3d 941, 951 (4th Cir.), *cert. denied*, 136 L. Ed. 2d 83, 117 S. Ct. 134 (1996); *see also United States v. Prevatte*, 66 F.3d 840, 848 (7th Cir. 1995) (Posner, C.J., concurring) ("I do think the maximum good-time credits should be subtracted. The defendant should not be allowed to say, 'My sentence is too long because I am planning to be a bad boy in prison and so won't earn the maximum good-time credits.'").

We also reject Ferranti's additional contention that, even considering the good-time credits, a 371-month term of imprisonment violates § 34 by falling uncomfortably close to his life

expectancy. A sentence that is close to a person's life expectancy based on actuarial tables is not the functional equivalent of a sentence for the actual life of the person.

Although the jury directive requirement was eliminated in 1994, see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title VI § 60003(a)(1), 108 Stat. 1968 (1994), the Ex Post Facto Clause precludes application of the 1994 amendment since Ferranti committed the arson in 1992 and, under the Ex Post Facto Clause, a retroactive change in the definition of a crime or a retroactive increase in punishment for a criminal act is forbidden. *See Collins v. Youngblood*, 497 U.S. 37, 43, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990).

C. The Fine

The statutory fine of $ 2,911,599.58 for the arson homicide count is raised as an issue on the grounds that it is overly punitive and based upon improper considerations. The sentencing court departed upwardly from the Sentencing Guidelines' range of $ 25,000 to $ 250,000, see U.S.S.G § 5E1.2(c), and, relying on 18 U.S.C. § 3571(b)(2), imposed a statutory fine equal to twice the amount of the victims' losses.

Section 3571(b)(2) cross-references § 3571(d), which states that "if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of . . . twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." We review the district court's decision to depart upwardly under an abuse of discretion standard. See *United States v. Wilder*, 15 F.3d 1292, 1300 (5th Cir. 1994) (abuse of discretion standard applied to appellate review of enhanced fine imposed under § 3571(d)); *cf. United States v. Lavin*, 27 F.3d 40, 42 (2d Cir. 1994) (*per curiam*) (order of restitution reviewed for abuse of discretion).

Defendant's basic point is that the amount of the fine is grossly punitive in light of his financial resources. Under 18 U.S.C. § 3572(a), a sentencing court must consider a number of factors, some pertaining to defendant, some to other concerns. Among those factors are: (1) the defendant's income, earning capacity and financial resources; (2) the burden the fine imposes on the defendant

and his financial dependents; (3) pecuniary loss inflicted upon others; (4) whether restitution is ordered; (5) the expected costs of imprisonment; and (6) whether defendant can pass along the costs of the fine to consumers or other persons. There is no requirement that explicit findings be made concerning the defendant's ability to pay the fine, *cf. Lavin*, 27 F.3d at 42 (no explicit findings needed to support imposition of restitution order), and defendant bears the burden of establishing his inability to pay. *See United States v. Marquez*, 941 F.2d 60, 65-66 (2d Cir. 1991).

The record shows that the district court considered the mandatory factors, including Ferranti's known assets and the possible financial dependence of his son and former wife. It also considered defendant's failure to file tax returns over the past 10 years and his refusal to disclose financial information during pre-sentencing proceedings. From this evidence it inferred that appellant possessed considerably more assets than he admitted, and therefore that he had the financial resources to pay the large fine imposed. This inference was reasonable because defendant failed to establish his inability to pay. Moreover, we cannot allow a defendant's lack of disclosure at the sentencing phase of the criminal proceedings against him to work to his advantage on an appeal from that sentence.

Ferranti also maintains that the district court's consideration of allegations of appellant's other criminal conduct was improper. Evidence of such conduct was offered at a pre-trial bail proceeding and noted in the pre-sentence report. However, the district court struck all references to such conduct from the report prior to sentencing. There is no evidence in the record from which we could conclude that, after striking the allegations, the district court impermissibly based imposition of the fine on that alleged criminal conduct. To the contrary, Judge Weinstein clarified that Ferranti's offense for which he was convicted and not his status as a slumlord or his unrelated violent conduct warranted the large fine.

In sum, the fine was reasonable and sufficiently supported by a record that fully demonstrates the exacerbated nature of the crime, the harm inflicted upon others, the defendant's ability to pay, and the lack of persons financially dependent upon defendant. See

18 U.S.C. § 3572(a) (setting forth factors that must be considered when imposing a fine).

CONCLUSION

Having considered all of Ferranti's challenges and finding no basis for reversal, the judgment of conviction with the sentence of conviction is accordingly affirmed.

18 USC § 844 Penalties

(a) Any person who violates any of subsections (a) through (i) ... shall be fined under this title, imprisoned for not more than 10 years, or both.

...

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

USSG §2A1.1. First Degree Murder

(a) Base Offense Level: 43.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 2113(e), 2118(c)(2); 21 U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing. However, this guideline also applies when death results from the commission of certain felonies. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would not be appropriate.

If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, the Commission does not envision that departure below that specified in § 2A1.2 (Second Degree Murder) is likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

2. If the defendant is convicted under 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed.

Background: [Deleted]

HISTORY: Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 82); November 1, 1990 (see Appendix C, amendment 310); November 1, 1993 (see Appendix C, amendment 476)

USSG §2A1.2. Second Degree Murder

(a) Base Offense Level: 33.

Commentary

Statutory Provision: 18 U.S.C. § 1111.

For additional statutory provision(s), see Appendix A (Statutory Index).

Background: The maximum term of imprisonment authorized by statute for second degree murder is life.

HISTORY: Historical Note: Effective November 1, 1987

USSG §2K1.4. Arson; Property Damage by Use of Explosives

(a) Base Offense Level (Apply the Greatest):

(1) 24, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling;

(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;

(3) 2 plus the offense level from § 2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or

(4) 2 plus the offense level from § 2B1.3 (Property Damage or Destruction).

(b) Specific Offense Characteristic

(1) If the offense was committed to conceal another offense, increase by 2 levels.

(c) Cross Reference

(1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. If bodily injury resulted, an upward departure may be warranted.

See Chapter Five, Part K (Departures).

2. Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.

3. "Explosives," as used in the title of this guideline, includes any explosive, explosive material, or destructive device.

HISTORY: Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 182, 184, and 185); November 1,